

Civil Litigation

Ontario court grants summary judgment to subcontractor after contractor breached trust condition

By **Daniel Escudero**

(June 2, 2022, 5:00 PM EDT) -- A Mississauga, Ont., paving company has been granted default summary judgment against a contractor for breach of trust after it was not paid for work completed on a commercial centre in suburban Toronto.

In *Pylon Paving (1996) Inc. v. Beaucon Building Services Inc.*, 2022 ONSC 3282, released June 2, Associate Justice Todd Robinson of the Ontario Superior Court of Justice granted Pylon Paving summary judgment against both Beaucon Building Services and Alain Beauchamp for default, jointly and severally, and for breach of trust in the amount of \$289,984, yet did not grant relief under s. 178(1)(d) of the *Bankruptcy and Insolvency Act* RSC, 1985, c B-3

Beaucon was contracted by 651565 Ontario Limited to perform renovation work at the Tapscott Commercial Centre in Scarborough.

Beaucon subcontracted Pylon to supply and install heavy duty asphalt paving and lap joint work for the project. Pylon did not receive payment for the work.

Beaucon and Pylon, as well as other subcontractors, preserved and perfected liens against the project.

Pylon commenced a breach of trust action against Beaucon and Beauchamp in which it sought relief under a trust provision of the *Construction Act*, RSO 1990, c C.30.

The paving company additionally sought judgment on its breach of trust claim against Beaucon and Beauchamp and a declaration pursuant to s. 178(1)(d) of the BIA, that the judgment against Beauchamp survived any subsequent assignment into bankruptcy.

Finally, Pylon brought a motion before Associate Justice Robinson seeking to strike the statement of defence of Beaucon and its principal, Beauchamp, and to note them in default.

Associate Justice Robinson granted Pylon's requested order, striking the statement of defence of Beaucon and Beauchamp and directing the registrar to note them in default, yet he reserved the quantum of relief.

Beaucon and Beauchamp were both served with Associate Justice Robinson's order in early April 2020 that noted them in default, yet no counsel was ever appointed by the defendant parties, nor any intention to act in person was served by Beauchamp. Pylon did not pursue its claim against defendant John Paul Hogan.

Issues before the court were:

- whether the statement of defence of Beaucon and Alain Beauchamp should be struck for non-compliance with court orders;
- whether Associate Justice Robinson had the jurisdiction to grant summary default judgment in the breach of trust action;
- whether summary judgment was appropriate in the circumstances; and

- whether Associate Justice Robinson had the jurisdiction to grant relief under s. 178(1)(d) of the BIA.

Striking the defence and noting in default

The judge began his analysis by assessing whether the statement of defence of Beaucon and Beauchamp should have been struck for non-compliance with court orders.

"Beaucon and Mr. Beauchamp were served with my order in early April 2020. Nevertheless, despite nearly two years passing between service of the removal order and this motion being heard, no lawyer was appointed, no motion for leave for Beaucon to be represented by a non-lawyer was brought, and no notice of intention to act in person was served by Mr. Beauchamp," wrote Associate Justice Robinson.

Associate Justice Robinson determined that Beaucon had uniformly defaulted on orders and procedural obligations in all actions arising from the Tapscott Commercial Centre project, including in its own lien action.

For those reasons, Associate Justice Robinson granted an order striking Beaucon's and Beauchamp's defence in accordance with subrules 15.04(7)(a) and 15.04(9)(a) of the *Rules of Civil Procedure* and "I directed the registrar to note them in default," Associate Justice Robinson wrote.

Whether to grant summary default judgment

In determining whether to grant a summary default judgment, Associate Justice Robinson centred his analysis on Rule 20 and Rule 1.04(1.1) of the Rules.

"Rule 20 permits summary judgment motions to be brought before an associate judge (with some restrictions on an associate judge's authority and powers) and contains no similar restriction to that found in subrule 19.04(3.1) (b) on jurisdiction to grant judgment for an unliquidated sum," wrote Associate Justice Robinson.

As for Rule 1.04(1.1), the associate judge concluded, "Rule 1.04(1.1) of the *Rules of Civil Procedure* provides that, in applying the rules, I must make orders and give directions that are proportionate to the importance and complexity of the issues and to the amount involved in the proceeding. In my view, in these circumstances, it would be disproportionate to require Pylon to bring a further motion specifically citing Rule 20. I accordingly find it appropriate to consider whether summary judgment should be granted on the record before me."

Whether summary judgment was appropriate

The court set a two-part test for granting summary judgment.

"The first stage requires the court to determine if there is a genuine issue requiring trial based only on the evidence in the record," the court wrote.

"If the evidence required to fairly and justly adjudicate the dispute is available on the record and summary judgment is a timely, affordable and proportionate procedure, then summary judgment may be granted."

The second stage "is triggered if there appears to be a genuine issue requiring a trial. The court should then determine if the need for a trial can be avoided by using the discretionary powers under subrules 20.04(2.1) and (2.2)."

The court decided that granting summary judgment to Pylon was appropriate because the evidence brought forth by Pylon was clear.

Beauchamp was solely responsible for the day-to-day operations of Beaucon on the project as he had personally signed Pylon's purchase orders for extras, the court found, and various quotes and invoices on the project were submitted by Pylon directly to Beauchamp by e-mail. There was also

"undisputed evidence" in the form of affidavits that supported the position that Beauchamp was directly involved in payment of subcontractors.

Whether to grant relief under s. 178(1)(d) of BIA

Associate Justice Robinson determined that he could not grant the relief sought by Pylon under the BIA.

"In my view, since I am neither a judge nor a registrar in bankruptcy, and have not otherwise been authorized by the Chief Justice to exercise any of the powers or jurisdiction conferred to the Ontario Superior Court of Justice by s. 183 of the BIA. I lack jurisdiction or authority to make any declaration under the BIA, including under s. 178(1)(d)," he wrote.

Counsel for the parties were not immediately available for comment.

Costs were set at \$6,118, payable to Pylon.

The plaintiff Pylon Paving (1996) Inc. was represented by Neeta Sandhu of Pallett Valo LLP in Mississauga, Ont.

If you have any information, story ideas or news tips for The Lawyer's Daily on business-related law and litigation, please contact Daniel Escudero at Daniel.Escudero@lexisnexis.ca or 905-415-5897.

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